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No. 83-19

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term 1983

STUART R. CRANE and BARBARA CRANE, his wife,
Appellants,

-vs-

STATE OF MICHIGAN, SYDNEY D. GOODMAN, HARRY W. JURY, JOSEPH B. FAREMOUTH, PAUL BRICKER, DALE E. SMITH, CASMER WOJNO, CLAUDIA JOSEPH, DOUGLAS L. ROSE, UNKNOWN AGENTS, UNKNOWN PERSONS, Jointly and Severally,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MICHIGAN

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether Appellants may invoke the jurisdiction of this Court pursuant to 28 USC 1252, when the appeal neither arises from a judgment, decree or order of a federal court, nor involves the constitutionality of an Act of Congress and is not taken in conformity with statute and the Supreme Court Rules.

2. Whether the United States Supreme Court has jurisdiction over an appeal when the federal questions presented were not raised, preserved, nor passed upon, either expressly or implicitly, by any of the courts of the State of Michigan which considered Appellants' claims.

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Appellees.

MOTION TO DISMISS

Appellees, pursuant to Rule 16, paragraphs 1(a) and 1(b) of the Rules of the Supreme Court of the United States, move this Honorable Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth.

STATEMENT

This is an appeal from an Order of the Supreme Court of the State of Michigan, denying Appellants' Application for Leave to Appeal a Circuit Court order dismissing the complaint of the Plaintiffs-Appellants on the ground that the Circuit Court lacked subject matter jurisdiction. The facts underlying this appeal are as follows:

Stuart R. Crane of 189 Cloverly, Grosse Pointe Farms, owns

and operates three inner city motels known as the Pallister Motel, 7641 Woodward Detroit, McNichols Riviera Motel, 21350 McNichols, Detroit and Cavalier Motel, 12300 Woodward, Highland Park.

An analysis by Michigan Department of Treasury auditors of the financial statements of these motels revealed understatements of Michigan sales, use and withholding taxes. Additionally, certain of the motels had not secured sales or cigarette tax licenses, had not filed Single Business Tax returns for certain tax years, and Mr. Crane refused to become licensed and/or registered for use tax; all of which constituted criminal violations and also gave rise to a jeojardy tax assessment in the amount of two hundred fifty-five thousand, one hundred twenty-eight and 08/100 dollars ($255,128.08).[1]

Stuart R. Crane, in May of 1979, authored an "Affidavit" in response to a subpoena issued by the Michigan Revenue Commissioner. In that Affidavit, Mr. Crane set forth his reasoning for refusing to comply with the subpoena as follows:

> "The State of Michigan has no authority to compel your deponent to be a Merchant in Equity against his will . . ."

On or about December 8, 1980, search warrants were issued for the books and records of the motels including the 189 Cloverly address of Mr. Crane, and a tax levy was also served on the assets of Mr. Crane pursuant to the jeopardy assessment.

On December 10, 1980, the Michigan Department of Treas-

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[1]

The criminal violations of the Michigan tax laws are defined and made punishable pursuant to 1941 PA 122 §27 as added by 1980 PA 162 §1; MCL 205.27; MSA 7.657(27). Statutory authority for issuance of a jeopardy assessment is founded on 1941 PA 122 §26 as added by 1980 PA 162 §1; MCL 205.26; MSA 7.657(26).

ury caused to be issued a tax warrant and notice of levy upon Stuart R. Crane.[2]

On February 12, 1981, the plaintiff-appellants filed a nine-count claim against the State of Michigan and various state officials ostensibly grounded in the common-law torts of *inter alia*, defamation, invasion of privacy and trespass, including a count alleging a 42 USC 1983 deprivation of their civil rights. This was the fourth of eleven lawsuits filed by Mr. Crane or his associates against the state arising from the execution of the search warrant and the state's issuance of the tax warrants.

On February 25, 1981, defendant-appellees filed a Motion for Accelerated Judgment based upon the ground that the Wayne County Circuit Court was without subject matter jurisdiction. Judge Thomas Roumell granted defendant-appellees motion on March 6, 1981. Plaintiffs-Appellants filed a Claim of Appeal in the Michigan Court of Appeals on March 9, 1981.

On November 3, 1981, defendants-appellees filed a Motion to Affirm on the ground that it was manifest that the question to be reviewed—whether the Circuit Court had subject matter jurisdiction over the plaintiffs-appellants' claim—was so unsubstantial as to need no argument or formal submission.

On June 11, 1982, the Court of Appeals entered an Order granting defendants-appellees' Motion to Affirm, the Court determining that the questions raised by the plaintiffs-appellants were so unsubstantial as to need no argument or formal submission and were without merit.

On or about June 28, 1982, plaintiffs-appellants filed an

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[2]

Statutory authority for issuance of a tax warrant and notice of levy is founded on 1941 PA 122 §25, as added by 1980 PA 162 §1; MCL 205.25; MSA 7.657(25).

Application for Leave to Appeal from the Court of Appeals' Order Granting defendants-appellees' Motion to Affirm. Said Application was denied by Order of the Michigan Supreme Court on April 20, 1983.

ARGUMENT

I.

APPELLANTS' APPEAL FROM AN ORDER OF THE MICHIGAN SUPREME COURT IS DEFECTIVE IN THAT 28 USC 1252 DOES NOT CONFER JURISDICTION UPON THIS COURT AND THE APPEAL IS NOT TAKEN IN CONFORMITY WITH STATUTE AND THE SUPREME COURT RULES.

Appellants seek review from an Order of the Supreme Court of the State of Michigan, but invoke the jurisdiction of this Court pursuant to 28 USC 1252. (Appellants' Jurisdictional Statement, page 2) Said statute provides as follows:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

The term "court of the United States" is defined in 28 USC 451. Said statute provides:

> "The term 'court of the United States' includes the Su-

> preme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title [28 USCS §§ 81 et seq], including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior."

Thus, jurisdiction invoked pursuant to 28 USC 1252 is limited to courts under Article III of the United States Constitution and certain federal courts created by Congress, and does not include the various state courts. See, *Shaw* v *Garrison*, (1975, D C La) 391 F Supp 1353; *Cartolano* v *Tyrrell*, (1976, D C Ill) 421 F Supp 526.

Further, this appeal does not involve the constitutionality of an Act of Congress. The Supreme Court of the State of Michigan has merely affirmed the ruling of the circuit court that a claim for money damages against the state or its officers must be brought in the proper forum. The courts of the State of Michigan which have considered this cause have never ruled, either expressly or implicitly, that an Act of Congress is unconstitutional. Indeed, the question of the constitutionality of any Act of Congress has never even been raised in any of the courts below.

> "[It] . . . is only when the constitutionality of a law of the United States is drawn into question, not incidentally, but necessarily and directly, that jurisdiction of the United States Supreme Court can be involved." *Ansbro* v *United States*, 159 US 695; 16 S Ct 187; 40 L Ed 310 (1895).

Accordingly, the jurisdiction of this Court cannot be invoked pursuant to 28 USC 1252 because the appeal is not taken in conformity therewith.

Even assuming jurisdiction was properly invoked pursuant

to 28 USC 1252, Appellants' failure to submit a notice of appeal within the time prescribed by 28 USC 2101(a) and Supreme Court Rules 11 and 12 would compel dismissal of the appeal.

The Order of the Supreme Court of the State of Michigan which denied Appellants' application for leave to appeal was entered on April 20, 1983. Appellants filed their Notice of Appeal with this Court on July 8, 1983—79 days after entry of the Order.

Supreme Court Rule 11.2 requires that a notice of appeal is to be "filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is [to be] docketed within the time provided in Rule 12".

28 USC 2101(a) prescribes the time within which an appeal pursuant to 28 USC 1252 must be taken. Said statute states in relevant part:

> "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title [28 USCS §§ 1252, 1253, 2282], holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court."

A motion to dismiss an appeal may be granted when based upon a failure to comply with the time requirements of the Supreme Court Rules. *Shapiro* v *Doe*, 396 US 488, 90 S Ct 641, 24 L Ed 2d 677, *reh den* 397 US 970, 90 S Ct 991, 25 L Ed 29 264 (1970). *Taggert* v *New York*, 392 US 667; 88 S Ct 2317; 20 L Ed 2d 1360 (1968).

In *Doe, supra,* the United States Supreme Court dismissed the appeal because the case had not been docketed until two days after the prescribed time for docketing had run. In the case at bar, the defect is much more serious. Not only is the filing of the notice of appeal 49 days late, but the appeal is clearly based upon the wrong jurisdictional statute.

In the recent case of *Donovan* v *Richland County Association for Retarded Citizens,* 454 US 389; 102 S Ct 713; 70 L Ed 2d 570 (1982), a county association for retarded citizens brought an action in the United States District Court for the District of Montana, seeking a declaratory judgment that the Fair Labor Standards Act did not apply to employees of a mental health facility operated by the association, or, in the alternative, that an application of the Act to the facility would be unconstitutional. The District Court held that the Act was unconstitutional as applied to the association in its operation of the facility.

The Secretary of Labor appealed to the Court of Appeals pursuant to 28 USC 1291 which provides that: "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." The United States Court of Appeals for the Ninth Circuit affirmed.

On appeal, the United States Supreme Court vacated the judgment of the Court of Appeals and dismissed the appeal. Specifically, the Supreme Court ruled that a direct appeal should have been brought pursuant to 28 USC 1252 and concommitantly, the Court of Appeals should have been precluded from ever taking jurisdiction.

More significantly to the case at bar, however, the Supreme Court ruled further that any additional relief was foreclosed

because an appeal which should have been taken pursuant to 28 USC 1252 must be taken in conformity with 28 USC 2101(a). Thus, because 28 USC 2101(a) prescribed that a section 1252 appeal must be taken within thirty days, the appeal to the Supreme Court could not be entertained. The Supreme Court ruled that the right to a timely and proper appeal had lapsed and expressly refused to remand the case to the District Court for entry of a fresh decree from which a timely appeal could commence.

In the case at bar, the only relevant jurisdictional statute upon which Appellants could have based their appeal was 28 USC 1257. *Donovan, supra,* however, forecloses Appellants' appeal at this time because the requisite time to properly appeal under 28 USC 1257, being ninety days, has also expired.

Supreme Court Rule 16.1(a) states as follows:

> "(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules."

Appellants' claim of jurisdiction, is, therefore, improper and is not taken in conformity with statute or the Supreme Court Rules. Accordingly, Appellants' appeal should be dismissed.

II.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO ENTERTAIN AN APPEAL WHEN THE QUESTIONS PRESENTED HAVE NEVER BEEN RAISED, PRESERVED, NOR PASSED UPON BY THE STATE COURTS BELOW.

The questions presented by Appellants were articulated as follows:

I. MAY THE STATE OF MICHIGAN PRECLUDE A PLAINTIFF FROM ASSERTING FEDERAL CIVIL RIGHTS CLAIMS GENERALLY, AND 42 USC 1983 CLAIMS SPECIFICALLY, IN THE STATE COURTS OF MICHIGAN WHEN THE CLAIM IS BASED UPON THE WRONGFUL ACTS OF INDIVIDUAL EMPLOYEES OF THE STATE OF MICHIGAN, ITS BRANCHES OR DEPARTMENTS, ON THE GROUNDS OF GOVERNMENTAL IMMUNITY, REGARDLESS OF THE CAPACITY IN WHICH THE EMPLOYEES ACTED OR THE NATURE OF THEIR ACTS?

II. MAY THE STATE OF MICHIGAN PRECLUDE CIVIL RIGHTS PLAINTIFF WHO BRINGS A CAUSE OF ACTION UNDER 42 USC 1983 FROM A TRIAL BY JURY?

Supreme Court Rule 15.1(g) specifies that a jurisdictional statement must set forth the manner in which the federal questions sought to be reviewed were raised, the stage of the proceedings in which the questions were raised, and the way in which the questions were passed upon by the various courts below.

It is the position of Appellees that because the questions presented were neither raised, preserved nor passed upon in the courts below, the United States Supreme Court lacks jurisdiction to consider this appeal.

In response to Appellants' complaint, against the State and various State officials, Appellees moved for accelerated judgment pursuant to Rule 116.1(2) of the Michigan General Court Rules of 1963, based upon the Circuit Court's lack of subject-matter jurisdiction. The ground upon which said motion was based was that a claim against the State of Michigan and

state officials must be brought in the Michigan Court of Claims, a forum specifically created by statute to consider said claims by 1961 PA 236, as amended, MCL 600.6401 *et seq;* MSA 27A.6401 *et seq.*

Appellants did not file an answer to Appellees' Motion for Accelerated Judgment. At the hearing on said motion, Appellants made no reference to 42 USC 1983.[3] Appellants have never pled or asserted at any time or in any court that the Michigan Court of Claims was precluded from hearing federal claims. Consequently, the courts below did not pass on that question.

The issue of governmental immunity has *never* been raised by any party at any time in any of the courts below. Accordingly, the questions presented were never raised, preserved nor passed upon by any of the state courts which heard Appellants' claims.

The United States Supreme Court has long held that questions not raised nor discussed in state courts cannot be urged in the Supreme Court, *Van Huffel* v *Harkelrode,* 284 US 225; 52 S Ct 115; 76 L Ed 256; 78 ALR 453 (1931); *Aero Mayflower Transit Co* v *Georgia Public Service Com,* 295 US 285; 55 S Ct 709; 79 L Ed 1439 (1935); *International Steel & Iron Co* v *National Surety Co,* 297 US 657; 56 S Ct 619; 80 L Ed 961 (1936); *Spector Motor Service, Inc* v *McLaughlin,* 323 US 101; 65 S Ct 152; 89 L Ed 101 (1944).

Furthermore, Appellants must affirmatively demonstrate from the record not only that the questions were presented to the highest court of the state from which appeal is sought, but also that the state court's adjudication of the questions was essential to the determination of the cause.

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[3]

See, appellants' appendix E, Circuit Court transcript of March 6, 1981, pages 26a-32a.

In *Lynch* v *People of New York*, 293 US 52; 55 S Ct 16; 79 L Ed 191 (1934), the New York State Tax Commission determined that rents received by a New York resident from property located in another state were taxable as income in New York. The taxpayer appealed, asserting that taxation of the rents by the State of New York worked a deprivation of rights afforded to the taxpayer by the Fourteenth Amendment of the United States Constitution.

The New York Supreme Court annulled the determination of the State Tax Commission citing the United States Supreme Court's construction and application of the Fourteenth Amendment, but did not expressly state that its decision rested upon application of the Constitution of the United States. The Court of Appeals of the State of New York affirmed without opinion.

The State Tax Commission's petition for a Writ of Certiorari to the United States Supreme Court was dismissed for lack of jurisdiction. The Court articulated the rationale for the dismissal as follows:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." (citations omitted)

Application of the *Lynch* standard to the case at bar compels dismissal of the appeal. For as the record below demonstrates, Appellants have never presented the questions set forth in their Jurisdictional Statement to any of the state courts below.

Accordingly, the federal questions could not have been "necessary to the determination of the cause," *Lynch, supra.*

In *Charleston Federal Savings & Loan Association* v *Alderson*, 324 US 182; 65 S Ct 624; 89 L Ed 587, *reh den* 324 US 888; 65 S Ct 863; 89 L Ed 1436 (1945), appellants contended that tax officials of West Virginia had assessed their property at full value in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court granted appellee's motion to dismiss based upon appellant's failure to explicitly attack the application of the state statute in the courts below, holding that:

> "It is essential to our jurisdiction on appeal under §237(a) [the statutory antecedent to 28 USC 1257] that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws . . . . [citations omitted] . . ." (commentary added)

See also, *Rohr Aircraft Corp* v *County of San Diego*, 362 US 628; 80 S Ct 1050; 4 L Ed 2d 1002 (1960); *Cardinale* v *Louisanna*, 394 US 437; 39 S Ct 1161; 22 L Ed 2d 398 (1969).

In the case at bar, Appellants utterly failed to articulate in any of the courts below how application of the doctrine of governmental immunity or the Michigan Court of Claims Act, *supra*, would preclude the state courts from hearing their 42 USC 1983 claim. Hence, there was no "explicit and timely insistence in the state court that the state statute, as applied, is repugnant to the Federal Constitution", *Alderson, supra.*

Appellants cite a plethora of federal and state cases involving governmental immunity. Appellees submit that all the governmental immunity cases are inapposite to the proceeding at bar

in that the record below is absolutely devoid of any reference to governmental immunity.

Appellants rely particularly on the case of *Scheuer* v *Rhodes*, 415 US 232; 94 S Ct 168; 40 L Ed 2d 90 (1974). In *Scheuer*, the Federal District Court for the Northern District of Ohio dismissed a claim brought pursuant to 42 USC 1983 on the ground that the action naming certain state government officials and Ohio national guardsmen was, in effect, an action against the State of Ohio, and thus, was barred by the Eleventh Amendment to the Constitution of the United States. The Court of Appeals affirmed, and in an alternative ground of sustaining the dismissal, ruled that the action was also barred by executive immunity. The Supreme Court reversed, holding that a state could not impart to its officials immunity from responsibility to the supreme authority of the Federal Constitution.

Scheuer, has no syllogistic relation to, and hence, does not control the proceeding at bar because it was an action brought in Federal District Court which expressly addressed the question of governmental immunity in the court of first instance, as well as throughout the appellate process. The case at bar, in contrast, was brought in state court and is a case in which the "issue" of immunity was never asserted, pled, waived or otherwise mentioned in any of the proceedings below.

Accordingly Appellees submit that the appeal should be dismissed pursuant to Supreme Court Rule 16.1(b) on the ground that the federal question sought to be reviewed was not timely or properly raised or preserved and as a result, was not expressly passed upon by the courts below.

CONCLUSION

Appellants' appeal is untimely and is based upon the wrong jurisdictional statute. The issues presented to this Court have not been raised, preserved nor passed upon, either expressly or implicitly by the state courts below. Therefore, in accordance with Supreme Court Rule 16, paragraphs 1(a) and 1(b), Appellees' Motion to Dismiss should be granted.

Respectfully submitted,

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